



October 22, 2002

Mr. James M. Frazier III
Assistant General Counsel
Office of the General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342-4004

OR2002-5967

Dear Mr. Frazier:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 170953.

The Texas Department of Criminal Justice (the "department") received a request for a copy of a specified administrative investigation file. You claim that the requested information is excepted from disclosure pursuant to sections 552.101 and 552.117 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we note that the submitted information is subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) states that a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is not excepted from disclosure unless expressly confidential under other law or as provided by section 552.108. You claim that the information at issue is excepted from disclosure pursuant to section 552.101 in conjunction with the common-law right to privacy,¹ as well as under section 552.117. These exceptions constitute "other law" for purposes of section 552.022. Therefore, we will address your arguments under these exceptions.

Information is protected from disclosure under section 552.101 and the common-law right to privacy if it is information that (1) contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). We note that the type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial*

¹ Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See Gov't Code* § 552.101. Section 552.101 encompasses information protected from disclosure by the common-law right to privacy.

Foundation included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *See id.* at 683.

In Open Records Decision No. 393 (1983), this office concluded that, generally, only that information which either identifies or tends to identify a victim of sexual assault or other sex-related offense may be withheld under common-law privacy. Based on our review of the information at issue, it appears that the requestor in this matter knows the identity of the alleged victim. Thus, we believe that withholding only the alleged victim's identifying information from the requestor in this instance would not preserve the victim's common-law privacy interests. Accordingly, we conclude that the department must withhold a portion of the submitted information in its entirety pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy. We have marked the information to be withheld under section 552.101. For the remainder of the submitted information, we will address your argument under section 552.117(3) of the Government Code.

Section 552.117(3) excepts from required public disclosure the home addresses, telephone numbers, social security numbers, or information revealing whether a department employee has family members regardless of whether or not the employee complies with section 552.024. Gov't Code § 552.117(3). However, the two individuals whose personal information is at issue are no longer employed by the department. Therefore, section 552.117(3) does not apply to the information, and it may not be withheld under this exception.

However, section 552.117(1) might apply to except such information. Section 552.117(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Thus, to the extent the former employee, other than the requestor, whose personal information is at issue elected under section 552.024 to keep this information confidential prior to the request, you must withhold it under section 552.117(1) of the Government Code. You may not withhold this information under section 552.117 for this former employee to the extent he has not made a timely election under section 552.024. We have marked the information that you must withhold if section 552.117(1) applies. We note that the requestor has a special right of access to any information pertaining to him that is excepted from disclosure under section 552.117(1).² *See* Gov't Code § 552.023 (person or a person's authorized representative has special right of access to information that relates to

² Because the requestor's information may be confidential with respect to the general public if he made a timely section 552.024 election, the department should again seek a decision from this office if it receives a future request for this information from an individual other than the requestor.

person and that is protected from disclosure by laws intended to protect person's privacy interest).

If not excepted under section 552.117(1), the social security numbers contained in the submitted information may nevertheless be confidential under federal law. A social security number may be withheld in some circumstances under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security numbers are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Public Information Act (the "Act") on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security numbers, you should ensure that they were not obtained or are not maintained by the department pursuant to any provision of law enacted on or after October 1, 1990. The department must release the requestor's social security number to him. Gov't Code § 552.023.

To summarize, the department must withhold the information we have marked pursuant to section 552.101 and common-law privacy. It must also withhold the information we have marked under section 552.117(1) if the former employee made a timely election under section 552.024. If not, this employee's social security number must be withheld if it was obtained or maintained by the department pursuant to any provision of law enacted on or after October 1, 1990. The department must release to the requestor the information pertaining to him otherwise excepted under section 552.117(1), including his social security number. The remainder of the submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

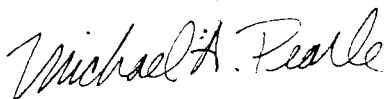
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael Pearle
Assistant Attorney General
Open Records Division

MAP/lmt

Ref: ID# 170953

Enc. Submitted documents

cc: Mr. Joshual Ellis
511 Harlem
Sweeny, Texas 77480
(w/o enclosures)